ed section 113 does not make any reference to section 27 of the Evidence Act. For this reason section 27 of the Evidence Act is neither abrogated nor repealed by implication. All statements if they fall within the province of section 27 of the Evidence Act are admissible in the courts of law. Such admissions are not repugnant to the amended section 113 of the Criminal Procedure Code. I therefore direct the learned President to reconsider the application of the learned Deputy Public Prosecutor to admit under section 27 of the Evidence Act a statement made by the accused in the course of police investigation and consider its admissibility either as a whole or in part wholly under the provision of section 27 of the Evidence Act. If it is necessary to recall any witnesses to reconsider the application of the learned Deputy Public Prosecutor the President shall be at liberty to recall them. The trial shall then proceed on the basis of this direction to its normal conclusion.

If any question arises as to the legality of this direction it shall await the outcome of the trial and be brought before the higher courts in the usual manner by way of appeal.

I make this direction as I consider it desirable in the interests of justice to do so, for, allowing a ruling such as the President's to abide in the Subordinate Courts would lead to considerable mischief in the prosecution of criminal trials therein and result in the complete miscarriage of justice. Judgments and orders as a result would not be a true reflection of the guilt or innocence of accused persons, prosecutions in Subordinate Courts would become a mockery and the courts would not be discharging their duty to society in a just and responsible manner.

Order accordingly.

PACIFIC AND ORIENT UNDERWRITERS (M) SDN. BHD. v. CHOO LYE HOCK

[O.C.J. (Abdul Hamid J.) December 15, 1976]
[Kuala Lumpur — Civil Suit No. 1697 of 1975]

Insurance — Motor insurance — Policy — Basis of contract — Agency — Construction of declaration — Evidence Act 1950, ss. 91 and 92.

This was an application by the plaintiffs to declare a policy of insurance in respect of a vehicle issued by them void *ab initio*. The grounds were, *inter alia*, that incorrect particulars were given by the proposer as to his occupation and address and that the particulars provided became a term of the contract of insurance by virtue of a basis declaration in the proposal form, to the effect that all the particulars are declared to be true and that they form the basis of the contract and further that any person who wrote the answers on the form did so as the agent of the proposer. In this case the form was filled in English and the proposer only spoke in Chinese to the issuing agent who filled in the form for him.

Held, dismissing the application: (1) in this case the statements concerning the address and occupation could not be regarded as answers to the questions appearing in the form;

(2) the respondent's statement of his address and occupation could not form the basis of the contract and therefore sections 91 and 92 of the Evidence Act could not apply;

(3) in this case the agent who filled in the form was not the agent of the respondent but that of the applicants;

(4) in the circumstances the application could not succeed and the applicants were disentitled to avoid the same.

Cases referred to:-

(1) *China Insurance Co. Ltd.* v. *Ngau Ah Kau* [1972] 1 M.L.J. 52.

(2) *Facer* v. *Vehicle & General Insurance Co. Ltd.* [1965] 1 Lloyd's Rep. 113, 120.

(3) *Newsholme Brothers* v. *Road Transport & General Insurance Co. Ltd.* [1929] 2 K.B. 356.

CIVIL SUIT.

Ong Chin Beng for the plaintiffs/applicants.

James Leslie Ponniah for the defendant/respondent.

Abdul Hamid J.: The Pacific and Orient Underwriters (M) Sendirian Berhad, the applicants/plaintiffs, have asked for a declaration that the policy of insurance No. 1043/PC/035460 in respect of motor car Toyota Corolla 1973 model registration number NE 8332 issued by the applicants to the respondent Choo Lye Hock was *void ab initio* and that the applicants are and at all material times entitled to avoid the same.

The applicants alleged that the respondent made a declaration to the effect that the answers in the proposal form are in every respect true and correct and if such answers are in the writing of any other person such person shall be deemed to be the respondent's agent for the purpose of filling the said proposal form and that the respondent also agreed that the declaration therein shall be the basis of the contract of insurance between the respondent and the applicants.

It is contended that the respondent made untrue statements in the proposal form in respect of (a) occupation, and (b) address (page 6 of the Bundle of Documents (BD)) when he stated his occupation as "timber merchant" and the address as "84, Cumming Road Seremban."

The applicants have stated that after investigation it was found that the respondent was only an employee at a plywood factory and there was no such address as 84 Cumming Road Seremban.

On the law counsel for the applicants cited the decision of the Federal Court in the case of *China Insurance Co. Ltd.* v. *Ngau Ah Kau*[1] where it was held that:

"(1) the answers to the questions had become terms of the contract of insurance and by reason of sections 91 and 92 of the Evidence Ordinance it was not open to plaintiff to adduce oral evidence to contradict, vary or add to or subtract from them; (2) the truth of the answers had been made a condition of the policy and it was not open to the trial judge to consider the question whether the answers to these questions were material or not."

It is therefore submitted that in the instant case the respondent is not entitled to introduce extraneous evidence to contradict or vary the written statements. As regards the respondent's allegation that he did not fill in the proposal form it is pointed out that the person who filled in the form was the respondent's agent. The applicants referred to the case of *Facer* v. *Vehicle & General Insurance Company, Ltd.*[2] where Marshall J. found that the agent there was the agent of the insured. In that case Marshall J. regarded the case of *Newsholme Brothers* v. *Road*

Transport and General Insurance Company, Ltd.[3] as one which governed his decision.

The respondent on the other hand is alleging that he did not read or write English and the proposal form was filled in by an agent of the applicants. The respondent stated that on or about February 28, 1973 intending to purchase a car he called at Messrs. Borneo Motors Sendirian Berhad at their place of business at Seremban. He was attended to by a male Chinese who held himself out as a salesman. Having agreed to purchase the car the said salesman asked for and took his identity card and proceeded to fill the proposal form for the insurance policy. Particulars as to his name and address as appearing in his identity card were copied down and filled into the proposal form. As regards occupation he told the salesman that he worked at a timber factory as a contract cutter but did not know what was filled in by the salesman as he did not understand the English language.

Now, the first question that calls for consideration is whether the statements or particulars concerning the address and occupation of the respondent in the proposal form shall be construed to form the basis of the contract. For this purpose it is relevant to consider the declaration at the bottom of the insurance proposal form (page 6 BD) which reads —

"I/we hereby declare that the motor car/vehicle described is and shall be kept in good condition, and that the answers above given are in every respect true and correct and if such answers are in the writing of any other person, such person shall be deemed to have been my/our agent for the purpose of filling in this form and I hereby agree that this Declaration shall be the basis of the Contract of Insurance between me and the Underwriters and agree to accept a Policy of Insurance according to the terms, exceptions and conditions expressed in and on the Policy."

The declaration specifically refers to the "answers" and by that it would mean those given in the proposal form in reply to the questions appearing therein. If so the statements concerning the address and occupation cannot therefore be regarded as answers to the questions. As such I do not see how the applicants can argue that these answers shall form the basis of the contract. The address stated by him would seem to be the usual address used by him and where he could be reached. As far as he was concerned it was his true address. As for his occupation again as far as the respondent was concerned he gave a true description but it was not entered correctly by the agent who filled in the form. I shall deal with this question shortly. Proceeding upon the basis of my finding that the respondent's statements of his address and occupation cannot form the basis of the contract I am further of the view and I do hold that sections 91 and 92 of the Evidence Ordinance cannot possibly apply to this particular case. In that event the respondent is entitled to explain the circumstances under which the misdescription of his occupation in the proposal form came to be recorded and it is relevant evidence for this court to consider, indeed, in consideration I find that the agent who filled in the form did use his own words to describe the respondent's occupation.

I am conscious of the fact that there is a declaration to the effect that if such answers are in the writing of any other person such person shall be deemed to have been an agent of the respondent for the purpose of filling in the form, nonetheless, I form the view that the agent was not the agent of the respondent but that of the applicants. To my mind the declaration only raises a rebuttable presumption. It may be rebutted by extraneous evidence and the onus lies upon the respondent. In the instant case it is abundantly clear from the affidavit evidence and in the light of the documents before this court that Eddy Chew, the agent named in the proposal form, was acting for and on behalf of the applicants. The fact that Eddy Chew's name appears at the top of the proposal form against the word "Agency" provides clear proof that he was the agent of the applicants and not of the respondent. In consideration it is my judgment that on the materials before me and for reasons that I have stated this application cannot succeed and I would proceed to declare that the said policy of insurance is a valid policy and the applicants are disentitled to avoid the same.

The applicants shall pay the costs of the respondent.

Application dismissed.

Solicitors: *Ong Chin Beng & Rakan-Rakan; Stanley Ponniah, Ng & Soo.*